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Nos. 84-871, 84-889, 84-1054 and 84-1069

IN THE

Supreme Court of the United States

October Term, 1985

LOUISIANA PUBLIC SERVICE COMMISSION,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, et al.,
Appellees

(and three consolidated cases)

ON APPEAL FROM, AND ON WRITS OF CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR GTE SERVICE CORP. AND AFFILIATED TELEPHONE COMPANIES, APPELLEES-RESPONDENTS

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QUESTIONS PRESENTED

1. Did the Federal Communications Commission reasonably interpret Section 220(b) of the Communications Act as automatically making FCC depreciation methods and rates binding on the State regulatory commissions when prescribed for telephone plant that is jointly used for both interstate and intrastate communication?

2. Did the FCC reasonably decide to preempt inconsistent State regulation of depreciation of jointly used plant, once the FCC had determined that it would frustrate Federal responsibility for the integrated national communications network to allow the States to order telephone companies to use different methods and rates for depreciating plant subject to FCC regulatory authority?

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Preliminary Statement

This brief is submitted on behalf of GTE Service Corporation and its affiliated domestic telephone operating companies (herein "GTE"),[1] which intervened as of right in support of the Appellee-Respondent Federal Communications Commission in the court below.

The Fourth Circuit upheld the FCC's decision that, under the Communications Act of 1934, the depreciation rates and methods prescribed by the FCC preempt inconsistent depreciation orders

1. GTE Service Corporation and its affiliated domestic telephone operating companies are wholly-owned subsidiaries of GTE Corporation. In compliance with the Court's Rule 28.1, a current list of principal subsidiaries of GTE Corporation is contained in Appendix IV to this brief. A more complete list of all subsidiaries of GTE is being filed with the Clerk.

of the States. *Virginia State Corp. Com'n.* v. *FCC*, 737 F.2d 388 (4th Cir. 1984), *aff'g Amendment of Part 31*, 92 F.C.C.2d 864 (1983) (*1983 Preemption Order*).[2] This Court should affirm the decision of the court below.

GTE adopts in all respects the consolidated brief filed jointly by American Telephone and Telegraph Company (AT&T) and certain other telephone company intervenors supporting the Commission. The instant brief is submitted to supplement the facts and legal analysis contained in the consolidated brief.

STATEMENT OF FACTS

GTE, as the nation's largest Independent (non-Bell) telephone company, participated from the outset in efforts to secure FCC sanction for modern capital recovery mechanisms for carriers. After the Commission approved the equal life grouping (ELG) and remaining life methods of depreciation in 1980 (J.A. 4) and 1981 (J.A. 45), the carriers encountered resistance to the use of these methods at the State commissions.[3] The GTE companies were among the carriers filing petitions for reconsideration of the FCC's April 27, 1982, order, which had held 3-2 that the Commission's prescriptions were not preemptive (A-61). These petitions resulted in the Commission's unanimous adoption of the *1983 Prescription Order* (A-24).

One of the GTE companies, General Telephone Company of Ohio ("GTC of Ohio"), also filed with the Commission on June 7, 1982, a petition for a declaratory ruling that the FCC's antecedent orders[4] prescribing rates and methods of depreciation for GTC of Ohio over the objections of the Ohio PUC, preempted the PUCO's subsequent opinion and order in GTC of Ohio's pending

2. The Fourth Circuit's opinion is printed in the appendices in Nos. 84-871, 84-889, and 84-1054 at A-1. The FCC's decision is printed in the appendices in Nos. 84-871 and 84-1054 at A-24 and in No. 84-889 at A-55.

Page references in this brief, shown as "A-1", "A-2", etc., are to the Louisiana Appendix (No. 84-871). This paging also corresponds to that of the Ohio Appendix (No. 84-1054) for those documents therein contained. Page references to the joint appendix filed in this Court are prefixed "J.A."

3. *1983 Prescription Order*, 92 F.C.C.2d at 877 (A-46).

4. General Tel. Co., 88 F.C.C.2d 1354 (Jan. 28, 1982) (remaining life); *same*, 88 F.C.C.2d 1567 (Feb. 3, 1982)(ELG).

rate case,[5] which rejected such rates and methods.[6] The preemptive declaration sought in the GTC of Ohio petition was granted by the *1983 Prescription Order*, 92 F.C.C.2d at 880 (A-50).

The FCC, in so ruling, noted that the record indicated a differential for GTC of Ohio of seven million dollars a year between depreciation levels prescribed by the FCC and those established by the Ohio Public Utilities Commission. *1983 Preemption Order*, 92 F.C.C.2d at 878-879 (A-48-49). As exemplified by this seven million dollar figure, the consequences of such inconsistencies in the absence of FCC preemption, can place serious risks on the firm caught between the two sovereigns.[7]

The record before the FCC showed that the imposition of inconsistent rates and methods of depreciation would block complete capital recovery by the carriers. Use of different depreciation methodologies and rates for interstate and intrastate purposes would mean that *the same item of plant* would be depreciated differently (that is, treated financially as having different lives) for interstate and intrastate service, so that a portion of the plant investment might remain on the books for State purposes when it had been fully depreciated for FCC purposes, or vice versa, leaving "stranded investment" in the rate base in perpetuity. Further, the record showed that only "sheer and remote chance" would produce consistent figures in interstate and intrastate plant accounts for any particular period, so that there could be no assurance aggregate revenues generated under Federal and State regulation would cover these varying depreciation accruals. *See* GTC of Ohio petition at J.A. 93-94 and 119-21; Joint Petition for Clarification at J.A. 134-35.

5. GTC of Ohio's petition is printed in the joint appendix at J.A. 89 - 121. Pertinent excerpts from the Ohio PUC's order of April 26, 1982, appear at J.A. 106 - 114 as Exhibit A to the GTC of Ohio petition. (The purported page heading at J.A. 106 is a departure from the record by the printer, and it should be disregarded.) The PUCO's order on rehearing, the pendency of which was noted in the FCC's *1983 Prescription Order* at ¶ 43 (A-49), is published at 49 P.U.R.4th 114 (1982).

6. *1983 Prescription Order*, ¶¶ 41-43, 92 F.C.C.2d at 878-79 (A-48-49). The GTC of Ohio petition is adverted to in the opinion below, 737 F.2d at 391 & n. 6 (A-8).

7. Commissioner Fogarty termed "alarming" the annual discrepancy between GTC of Ohio's allowed depreciation under Federal and State rules. 92 F.C.C.2d at 884 (A-60).

The FCC concluded on the basis of the record that the resulting "improper capital recovery ... could, ultimately, threaten carriers' ability to fully recover their invested capital." *1983 Preemption Order*, 92 F.C.C.2d at 877 (A-46). The failure to recapture capital investment on a realistically prompt basis would in turn, the FCC found, retard technological innovation beneficial to the integrated interstate telecommunications network and would give unregulated competitors an unwarranted advantage over the regulated telephone companies. *Id.*

SUMMARY OF ARGUMENT

The FCC properly concluded that, under the Communications Act of 1934, the Federal commission's prescriptions of depreciation rates and methods are binding on the carriers and the State commissions. Inconsistent determinations by the States as to depreciation are preempted by force of law.

I.

A. In structuring the 1934 Act as a whole, Congress faced up to the conflict between Federal and State jurisdiction inherent in regulating property used both for interstate and intrastate services, and it resolved the potential conflict in favor of preemptive Federal authority.

B. With respect to depreciation the Commission properly construed the language of Section 220(b) of the 1934 Act to require the carriers to adhere to FCC prescriptions and the State utility commissions to recognize these prescriptions, unless specifically excepted by the Commission under Section 220(h). Analysis of the text of Section 220 compels this result. Moreover, the legislative history of Section 220 shows that Congress consciously chose to confer preemptive power on the new FCC with regard to depreciation. The Interstate Commerce Commission, the FCC's predecessor, indisputably had preemptive power over telephone depreciation. President Roosevelt urged that the ICC's powers be transferred to the new Communications commission, and Congress ultimately did so. In the course of the legislative process the National Association of Regulatory Utility Commissioners (NARUC), on behalf of the States, had proposed bill language

to insulate State jurisdiction against continuation of the ICC's preemptive power. That language was included in the companion bills introduced in both houses of Congress in the 73d Congress. NARUC-sponsored language designed to change the law by constricting the FCC's jurisdiction over depreciation was consciously rejected by the Senate and did not survive conference.

C. The intrastate exemptions under Section 2(b) of the Act do not limit the preemptive effect of Federal prescriptions under Section 220. By itself Section 2(b) at most preserves State authority over purely intrastate rates and purely intrastate facilities. But this case involves interstate carriers over whom the FCC has explicit jurisdiction, and it involves property used in interstate (as well as intrastate) communication. As Section 220(i) reflects, Congress chose to accommodate the State interest in such "dual jurisdiction" property by directing the FCC merely to *consult* with the State commissions, but it did not require the FCC to *defer* to them.

Textually, Section 2(b)(1) is but a paraphrase of the language of Section 1 of the Interstate Commerce Act. Just as that language did not limit the plenary authority of the ICC with respect to depreciation under the predecessor language of Section 220(b), so Section 2(b)(1) does not limit the FCC's plenary authority under Section 220(b). Section 2(b)(1)'s legislative history shows that at most it was intended to reverse the *Shreveport* doctrine,[8] thereby barring Federal prescription of intrastate rates. The FCC's action below, which does not amount to a prescription of intrastate rates, bears no resemblance to the ICC's action in *Shreveport*.

Depreciation has always been considered a special and separate matter, and hence the *Shreveport* reservation of Section 2(b)(1) is not at issue here. Since Section 220 gives the FCC the power to prescribe depreciation rates and methods specifically in paragraph (b) and contains its own intrastate exception in paragraph (h), such depreciation prescriptions are not within Section 2(b)(1)'s general prohibition against prescribing intrastate rates

8. In Houston, E. & W. Tex. Ry. v. U.S., 234 U.S. 342 (1914) (the *Shreveport* case), the Court held that the intrastate proviso in Section 1 of the Commerce Act did not prevent the ICC from directly ordering intrastate rates raised in order to eliminate discrimination against interstate commerce.

themselves. If the language of Section 2(b)(1) had been conceived as extending to foreclosure of Federal preemption of depreciation, NARUC would not have found it necessary in 1934 also to propose -- unsuccessfully -- the addition to Section 220 of a proposed paragraph (j)(1), which would have separately exempted State depreciation orders from FCC authority.

II.

The FCC properly declared its prescription of rates and methods of depreciation to be preemptive of inconsistent State orders.

A. Congress clearly contemplated that the FCC, no less than the ICC, should have plenary power over depreciation systems in the interest of uniformity. The FCC's interpretation of Section 220, giving its prescriptions preemptive effect, should be sustained by the Court as being within Congress' intent.

B. Although the FCC had not previously found it necessary to make its depreciation orders preemptive, it did not thereby forfeit the power to do so under Section 220 when circumstances warranted. Neither the 1934 Act nor its predecessor, the Esch-Cummings Act of 1920, contemplated instantaneous Federal occupancy of the field of depreciation. Practice under the ICC and the FCC, validated by this Court in *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133, 159-60 (1930), and *Northwestern Bell Tel. Co.* v. *Nebraska State Ry. Com'n.*, 297 U.S. 471, 478 (1936), permitted State regulation of depreciation to exist until displaced by Federal prescription. The FCC's practice of holding "three-way meetings" on depreciation with the State and the carrier is wholly consistent with Section 220(i), which authorizes the FCC to "consult" with the States but does not require it to accede to non-uniform systems of depreciation. The FCC's deferral of its preemptive declaration until it became apparent that non-conformity by the States was becoming a significant problem was an appropriate exercise of Federal-State comity.

C. The FCC adequately explained why it determined no longer to allow carriers to depart from uniform Federal depreciation rates and methods. The Commission's determination in its *1983 Preemption Order* to invoke its preemptive powers under the 1934 Act was a reasonable one in light of current conditions in the

telephone industry. The introduction of competition into a heretofore monopolistic environment by the FCC, the Bell divestiture by the courts, and other developments rendered inadequate previous rates and methods of depreciation. The discrepancies between Federal and State depreciation rates and methods had become economically intolerable.

In Section 1 of the 1934 Act, Congress manifested its intent to centralize in the FCC authority to achieve its purposes. The Court should defer to the agency's expert judgment that inconsistent State depreciation orders would undermine important Federal policies.

ARGUMENT

I.

BY STATUTE THE FCC'S DEPRECIATION ORDER BINDS THE STATES.

The Federal Communications Commission properly concluded that, under the scheme of the Communications Act of 1934, the telephone companies for which the Commission has prescribed rates and methods of depreciation are obliged to adhere to such rates and methods, and the States are foreclosed by force of statute from imposing differing rates and methods on these companies.

Even if the Court, upon its own analysis of this complex regulatory statute and plan, were left with some uncertainty about precisely what Congress intended, this would be the classic kind of case in which to defer to the expert agency's careful and unanimous interpretation of the regulatory scheme that Congress has charged the FCC to administer. *See Chevron, Inc.* v. *NRDC*, 104 S.Ct. 2778, 2782 (1984); *Securities Industry Ass'n.* v. *Board of Governors*, 104 S.Ct. 3003, 3009 (1984); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-27 (1971); *Red Lion B/Cg. Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

A. Congress Opted for Federal Regulation of Property Used Jointly for Interstate and Intrastate Communication.

In writing the 1934 Act, Congress faced up to the potential conflict between Federal and State jurisdiction inherent in regulating property used both for interstate and intrastate services, and it resolved the potential conflict in favor of ultimate Federal supremacy.

Congress, in considering the various communications bills in the early 1930's, realized that any viable statutory scheme would have to address the dual-jurisdictional nature of the domestic telephone industry.[9] Any satisfactory regulatory scheme would have to accommodate the facts that telephone lines and other ratebase property are used both for interstate and intrastate communication service and that, with the exception of AT&T itself, the same carriers provided both interstate and intrastate services.[10] The careful attention that was paid to this jurisdictional problem in the legislative process is manifest in numerous provisions of the Act accommodating in various ways the different Federal and State interests. *See, e.g.*, Sections 2(b), 208, 213(h), 214(b), 220(h)-(j), 221, 410.

There is no textual question but that Congress intended the 1934 Act to apply to property used in the provision of interstate communication service even if that same property were also used in the provision of intrastate communication service. The statutory scheme is readily apparent from the text of the Act.

Section 1 identifies among the national policies underlying the Act that of assuring, so far as possible, "to all the people of the

9. The ICC's telephone regulation following the Mann-Elkins Act of 1910 had been relatively unobtrusive. As discussed more fully at pp. 17-18, *infra*, a 1929 Senate proposal to strengthen Federal regulation of the communications industry had sparked strong State reaction, suggesting that passage of the communications legislation might prove to be politically dependent on a more fine-grained accommodation of State interests.

10. In Smith v. Illinois Bell Tel. Co., 282 U.S. 133, 150-51 (1930), this Court had already decided that, because local plant is used for interstate calls, an appropriate percentage of local plant costs should be placed within the jurisdiction of Federal rather than State regulators. Currently that proportion is about twenty-five percent of non-traffic-sensitive plant. *See 1983 Preemption Order*, 92 F.C.C.2d at 877 (A-45).

United States" adequate and universal telephone service at reasonable rates.[11] To achieve the purposes of the Act, Congress centralized in the new commission existing and additional authority "to execute and enforce the provisions of this Act." 47 U.S.C. § 151 (App. I at I-4).

Section 2(a) then provides that the Act "*shall apply* to *all* interstate and foreign communication by wire or radio ... and to *all* persons engaged ... in such communication..." (App.I at I-4-5) (emphasis supplied). The Act literally applies to *all* interstate communication, as carefully defined in Section 3(e), without exception.

Without limiting that statutory reach in the slightest, Section 2(b)(1) cautions that the Act does not apply to charges and other tariffable features that are used exclusively "for or in connection with intrastate communication service" provided by any carrier. The Act does not define "intrastate communication," because it is no more than that part of "communication" (defined in Section 3[(a), (b)]) which falls outside of "interstate communication," as defined in Section 3(e). Thus, Section 2(b)(1) does not purport to *withdraw* any part of the comprehensive authority given the FCC by Section 2(a) over all persons and facilities involved in providing interstate communications. It simply acknowledges State responsibility for purely intrastate facilities and services not treated as part of the "interstate" network. Conceptually, therefore, the permissible regulatory jurisdiction of the States is purely residual; the States possess autonomy in the regulation of carriers and "dual jurisdiction" telephone facilities only to the limited extent that Congress chose not to displace existing State authority. That limited residual authority in the States, however, does not include any Congressionally delegated power over property used jointly for intrastate and interstate communications which might be construed as an implied limitation on the authority expressly conferred upon the Commission.

11. The U.S. Court of Appeals for the District of Columbia Circuit relied on the quoted phrase in rejecting the contention that the FCC could not act to benefit intrastate service. NARUC v. FCC, 237 U.S.App.D.C. 390, 403 n. 6, 737 F.2d 1095, 1108 n. 6 (1984)(per curiam), *cert. denied*, 105 S.Ct. 1224 (1985); *cf.* Colorado v. U.S., 271 U.S. 153, 168 (1926).

Congress chose to accommodate the State interests in such dual jurisdiction property by authorizing the FCC to consult with the State commissions, but it did not require the FCC to defer to them. *See, e.g.*, Section 220(i) (accounts); Section 214(b) (certificates of public convenience and necessity); Section 221(c)(jurisdictional separations) and 410(a-c)(joint boards and cooperation with State commissions). Had Congress intended to withhold from the FCC jurisdiction over such property, such consultative provisions would have been either superfluous or contradictory.

If Congress in Section 2(b) had intended to fragment regulatory authority over property used for interstate communication -- including the property covered by the FCC orders in this case -- simply because that property is also used for intrastate communication, it knew how to manifest that intent. It would have described the power reserved to the States by using in Section 2(b)(1) -- as it did in Section 221(b) -- the language, "even though a portion of such ... service constitutes interstate or foreign communication...." *See North Carolina Util. Com'n.* v. *FCC*, 552 F.2d 1036, 1046 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977)(North Carolina II).[12]

Congress, however, did not crimp the FCC's overarching responsibility to deal comprehensively and authoritatively with all property used in interstate communication. Although the drafters carefully delineated the general scope of the Act to stay within the Commerce power, the virtually limitless reach of Congress' Constitutional power over carriers -- already marked out in the Court's *Shreveport* decision -- imposed no real constraint.

B. Section 220(b) Makes FCC Prescriptions of Depreciation Binding for All Carrier Property.

The Commission properly construed the language of Section 220(b) of the Act to require the carriers to adhere to FCC prescriptions of depreciation rates and methods. The legislative history of Section 220 clearly reveals that Congress consciously

12. Compare the explicit language from the 1934 amendments to the Federal Power Act and the 1938 Natural Gas Act, *infra* note 45, limiting Federal authority.

chose Federal supremacy for all depreciation and rejected State claims to unrestricted complementary authority.

1. *The Text of Section 220(b) Accords Preemptive Effect to FCC Prescriptions of Depreciation.*

Section 220 embodies a comprehensive and exclusive system for carrier accounts and charges relating to depreciation. Under Section 220(b) the depreciation rates and methods prescribed by the FCC presumptively preempt inconsistent State requirements, unless specifically excepted by the Commission under Section 220(h).

By Section 220(b) the Commission was mandated to classify depreciable property of the carriers subject to the Act and to prescribe depreciation rates for "each of such classes of property...." Section 220(b) further provides that the percentages of depreciation so prescribed "shall" be charged with respect thereto, and that "carriers shall not, ... after the Commission has prescribed percentages of depreciation, charge ... depreciation other than that prescribed ... by the Commission."[13] The language of Section 220(b) is clearly mandatory.[14] Once the FCC

13. Section 220(b) sets forth Congress' comprehensive scheme in these terms:

> The Commission *shall*, as soon as practicable, *prescribe* for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers *shall not*, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to *any* class of property a percentage of depreciation *other than* that prescribed therefor by the Commission. No such carrier shall *in any case* include in any form under its operating or other expenses *any* depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. [emphasis added]

14. As we explain fully below, these provisions in the Communications Act were carried over from the amended Interstate Commerce Act, which had given the ICC responsibility to regulate telephone companies, including the power to prescribe depreciation rates. *See, e.g.*, Telephone and Railroad Depreciation Charges, 118 I.C.C. 295, 326

acts its decisions are binding, unless it makes an affirmative finding under Section 220(h) that allowing different State treatment would be "consistent with the public interest." Only in that limited circumstance after the FCC has acted may carriers follow inconsistent orders of the State commissions with respect to depreciation.

The States, however, deny the preemptive force of FCC depreciation decisions under Section 220(b) because, they claim, FCC-prescribed accounts promulgated under Section 220(a) do not bind them in intrastate ratemaking proceedings.[15] There are two basic flaws in this line of argument.

First, it is without textual support. Section 220(a) provides that the Commission "may, in its discretion, prescribe the forms of any and all accounts." Section 220(g) generally provides that, "after the Commission has prescribed the forms and manner of keeping of accounts..., it shall be unlawful ... to keep any other accounts ... than those so prescribed ... or to keep the accounts in any other manner than that prescribed or approved by the Commission."[16] In asserting that they are free to disregard the accounts prescribed by the FCC under Section 220(a), the States ignore Congress' deletion in 1934 of the NARUC-sponsored language from proposed Section 220(j)(2) of both the House and Senate bills that would have expressly preserved the authority of the States to obligate carriers to keep "any accounts, records, or memoranda which may be required to be kept by any State commission...."[17] *Cf. Kansas City So. Ry.* v. *U.S.*, 231 U.S. 423, 442 (1913)("Congress ... manifested a purpose to standardize and render uniform the accounts...."). While the FCC has sometimes *allowed* the States to require additional sub-accounts for

(1926). The ICC had relied on the mandatory nature of its depreciation prescriptions in Telephone and Railroad Depreciation Charges, 177 I.C.C. 351, 366-68 (1931).

15. Maine brief at 17-19; California brief at 6-7; Louisiana brief at 27-28; *cf.* FCC order, released April 27, 1982, at ¶¶ 32-35, 89 F.C.C.2d 1094, 1108 (A-61, A-82-83). The States' reliance on *PT&T Co.* v. *CPUC*, 62 Cal.2d 634, 666, 44 Cal. Rptr. 1, 401 P.2d 353, 372-73 (1965), is misplaced. The California court's opinion neither considers nor even mentions Federal authority under Section 220(b) over depreciation of dual jurisdiction property.

16. Section 220(g). Paragraphs (d) and (e) provide for civil and criminal penalties for failure to keep accounts as prescribed by the Commission.

17. California brief at 22-24.

purely intrastate ratemaking purposes, it is not at all clear that they would be entitled to do so, despite the apparently plain and preemptory terms of Sections 220(a) and (g), if the FCC did not approve or authorize these deviations under Subsection (g) or (h).

Second, the States' contention as to prescribed *accounts* simply misconceives the issue here. The *1983 Preemption Order* was limited to *depreciation* under Section 220(b). *Op. cit.*, 92 F.C.C.2d at 870, 873-74, 878 (A-33,-40,-48). The FCC was not required to decide, and did not decide, to what extent FCC-required accounting entries in general are binding on the states for ratemaking purposes. The Commission's powers as to accounting systems and as to depreciation systems are different and are separately stated in Section 220. Subsection (b) makes depreciation rates and methods prescribed by the Commission binding on the carriers and declares, with substantive effect, that no other depreciation charges with respect to carrier property are permissible. Subsections (a) and (g), on the other hand, relate to the general forms of accounts.[18] Pursuant thereto the FCC itself has recognized the substantive regulatory interests of the States in requiring additional or different information and has permitted "additional" or "subdivided" accounts.[19] Because of these differences in function and effect between accounting format and substantive depreciation prescriptions, agency practice as to accounting under Subsections (a) and (g) does not provide a guide to the construction of Subsection (b) governing depreciation.

2. *The Legislative History Confirms a Conscious Decision by Congress in Favor of Preemptability.*

The legislative history behind Section 220 unmistakably demonstrates that Congress consciously faced the preemption issue and consciously chose to allow FCC prescriptions of depreciation methods and rates to override inconsistent state orders.

The FCC inherited the preemptive power of the ICC with respect to depreciation. In his message to the first New Deal

18. *See* AT&T Co. v. U.S., 299 U.S. 232, 242-43 (1936).

19. *See, e.g.*, Uniform System of Accounts, 47 C.F.R. §§31.01-1(f), 31.01-2(d) and (f), and 33.12(d).

Congress, calling for centralization of "broad authority" over communications in a new Federal Communications Commission,[20] President Roosevelt urged that the ICC's telecommunications powers be transferred to the new commission and expanded. Section 1 of the 1934 Act makes clear Congress' general intent not only to transfer to the FCC the ICC's existing authority but also to "centralize" in the FCC even additional authority to serve as the primary agency with national responsibility to promote and regulate a modern, efficient, integrated telecommunications network.[21]

Congress adopted almost word-for-word the indisputably preemptive language of Section 20(5) of the Interstate Commerce Act[22] and rejected State commission attempts to add modifying language that would have permitted the State commissions to prescribe rates of depreciation in the exercise of their intrastate jurisdiction. Instead, Congress merely authorized the FCC "to investigate and report to Congress upon the desirability of legislation ... permitting State commissions to prescribe their own percentage rates of depreciation and systems of accounts for carriers."[23] The FCC never recommended conferring that authority on State commissions, and Congress has not done so.[24]

20. S. Doc. No. 144 (73d Cong., 2d Sess.) (Feb. 26, 1934); 78 Cong. Rec. 3272.

21. Section 1 (Purposes of Act, Creation of Federal Communications Commission) of the 1934 Act recites Congress' creation of the FCC to "execute and enforce" the Act's provisions "for the purpose of securing a more effective execution of [its] policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority...." 47 U.S.C. § 151 (App. I at I-4).

22. The virtual identity of Section 20(5) of the Interstate Commerce Act, as amended by the Esch-Cummings Act of 1920, and Section 220(a),(b) of the Communications Act of 1934, is demonstrated by the side-by-side comparison in Appendix III, *infra*.

23. Statement of the House managers accompanying the conference report on S. 3285 (73d Cong., 2d Sess.), H.Rpt. 1918 at 47 (June 8, 1934); 78 Cong. Rec. 10987 (June 9, 1934).

24. In 1935 Congress adopted a resolution authorizing and directing the FCC to "investigate and report" on the telephone industry "in aid of legislation by the Congress...." In Section 2 of the resolution Congress directed that the Commission's investigation include a study of the accounting methods, "particularly with reference to depreciation accounting," etc., of both the fully subject and non-fully-subject companies. S.Jt.Res. 46 (74th Cong., 1st Sess.), Pub. Res. No. 8, 49 Stat. 43, ch. 31 (approved March 15, 1935). The Commission's report of its investigation, the so-called *Walker Report*, made no recommendations

a. The ICC Concededly Had Preemptive Power as to Depreciation.

All the parties involved in the drafting of the 1934 Act conceded that the Interstate Commerce Commission had preemptive power with respect to telephone company depreciation.

In *Telephone and Railroad Depreciation Charges*, 118 I.C.C. 295 (1926),[25] the ICC had dealt with the contention of the State commissions that the statute gave the ICC "discretion ... to refrain from prescribing depreciation requirements for the local telephone companies which in reality are engaged only to an insignificant extent in interstate commerce." The ICC held not only that it had jurisdiction to prescribe depreciation standards that would govern intrastate ratemaking but that it was obliged by the statute to do so insofar as practicable.[26]

for "legislation to define further or harmonize the powers of the Commission and of State commissions" with respect to depreciation. *See* Report of the Federal Communications Commission of the Investigation of the Telephone Industry in the United States, H. Doc. No. 340 (76th Cong., 1st Sess.) Part II (GPO 1939)(Walker Report).

25. This was an interlocutory order issued in consolidated proceedings on railroad and telephone depreciation instituted by the ICC on its own motion pursuant to Section 20(5). The order prescribed depreciation accounting to become effective January 1, 1928. Because of objections of the railroads, the effective date was deferred several times. The ICC subsequently reaffirmed its jurisdiction in *id.*, 177 I.C.C. 351 (1931). The ICC later rejected challenges to its authority to promulgate the uniform system of accounts except as to interstate operations in Accounting of N.Y. Tel. Co., 188 I.C.C. 83, 84-85 (1932), and Accounting Rules for Telephone Companies, 203 I.C.C. 13, 17 (1934).

26. Chairman Eastman, writing for the commission, said:

> It seems to be well established that where a local telephone company undertakes to originate or deliver toll messages, and most of them do so undertake, practically all of its property is open for use in interstate commerce and at any time may be so used. Under such circumstances, no doubt would seem to exist as to the power of Congress to regulate the accounting practices of such companies with respect to their property, including the accounting for depreciation.

Id., 118 I.C.C. at 332.

Rejecting NARUC's contention that the ICC should exercise its discretion "to refrain from prescribing depreciation requirements for the local telephone companies which in reality are engaged only to an insignificant extent in interstate commerce," Chairman Eastman continued:

> So far as the companies in classes A, B, and C are concerned, however, we are unable to conclude that the prescription of depreciation requirements by us ... is *impracticable*. Unless and until the provisions of paragraph (5) of Section 20 are changed

Later in the same proceeding the ICC again rejected challenges to its authority to mandate depreciation charges, pointing out that "obviously the 1920 amendment gives us the complete control over the substance of [depreciation] accounting...." *Id.*, 177 I.C.C. at 366 (1931).

NARUC's General Solicitor, John E. Benton, testified before the Senate Commerce Committee in 1930[27] and again in 1934,[28] that the States were bound by ICC prescriptions of depreciation and urged that the law be changed. Other witnesses agreed that

> by Congress, therefore, we ... must endeavor to enforce them in the case of such companies.

Id. at 332-33.

27. With his 1930 testimony Benton submitted for the record his article, "Why the State Commissions Oppose the Couzens Bill," containing the following paragraphs characterizing the Section 20 language incorporated in the 1929 bill (and later in the 1934 bills):

> The bill would also give the new commission the same power to control accounts and reports of companies which transmit intelligence as the Interstate Commerce Commission has over the accounts and reports of carriers subject to its jurisdiction. For this purpose appropriate sections have been incorporated from the interstate commerce act. Included is paragraph (5) of section 20, which makes it the duty of the commission to prescribe the depreciation charges of all carriers subject to the act.
>
> Under the provision the new commission would be obliged to prescribe the depreciation charges for every telephone company, however slight its participation in interstate business. * * *

Hearings on S. 6 before the Senate Committee on Interstate Commerce (71st Cong., 2d Sess.) 2224, 2229 (Feb. 5, 1930) ("Commission on Communications").

28. His 1934 statement said in this regard:

> Ever since Congress in 1920 empowered the Interstate Commerce Commission to prescribe rates of depreciation, the State commissions have believed that it would work to their embarrassment and do the public injury.
>
> * * *
>
> I wish to put into this record what I said on this subject at the hearing before this committee in February 1930, which was as follows:
>
> "Mr. BENTON. Now, as to depreciation. This bill provides that the new commission shall fix the rates of depreciation for each class of property for every company subject to its jurisdiction.
>
> "This has been the duty of the Interstate Commerce Commission ever since the enactment of the Transportation Act of 1920, both as to railroads and as to all companies subject to its jurisdiction.
>
> * * *

the ICC had preemptive authority under the 1920 Act.[29] Subsequently Benton testified before the House committee that the ICC then had the power to "override State regulation in the telephone field..." House Hearings at 135-36.

b. NARUC Opposed Initial Proposals to Transfer the ICC's Powers Over Depreciation.

The State commissions strenuously and repeatedly opposed any Congressional attempt to transfer to the new Communications commission the existing powers of the ICC over depreciation. The first serious Congressional effort to restructure Federal regulation of the telephone industry occurred in 1929. The 1929 bill, S. 6, introduced by Senator Couzens, the Republican chairman of the Commerce Committee, had simply copied the depreciation provisions of Section 20(5) into proposed Section 37(b), word-for-word. The NARUC witness vigorously opposed that aspect of the bill.[30] NARUC's annual conventions had passed

> "The State commissions believe that it is not in the public interest that this provision, providing for the Federal Commission to fix these rates of depreciation, should be in the law at all. * * *
>
> "It is dangerous, because if they are fixed wrong, then ... the State commission's hands are tied."

Hearings on S. 2910 before the Senate Committee on Interstate Commerce (73d Cong., 2d Sess.) 181 (March 15, 1934) ("Federal Communications Commission"), *quoting* Hearings on S. 6 before the Senate Committee on Interstate Commerce (71st Cong., 2d Sess.) at 2213-14 (February 5, 1930) ("Commission on Communications").

29. *See, e.g.*, Testimony of Kit F. Clardy, Chairman of NARUC's Legislative Committee, 1934 Senate Hearings, *supra*, 153 at 155 ("if [the ICC's present powers] were exercised to the fullest extent the State commissions would be entirely ousted from their jurisdiction.").

At the 1930 hearings AT&T President Gifford had testified that "all the accounts of all of our companies" were kept in accordance with the ICC's uniform system of accounts and that the ICC was "engaged in fixing our rates of depreciation." Hearings before the Senate Commerce Committee on S. 6 (71st Cong., 1st Sess.) 1990 ("Commission on Communications"); *cf. id.* at 2027, 2051. Frank B. McKinnon, President of USITA, told the Senate committee that the Independents similarly used a single, unseparated accounting system prescribed by the ICC. *Id.* at 2119 (February 3, 1930). Accord, Testimony of Charles C. Deering, Secretary of USITA, *id.* at 2139-40.

30. Testimony of NARUC's General Solicitor Benton, Hearings on S. 6 before the Senate Committee on Interstate Commerce (71st Cong., 2d Sess.) 2212-17, 2229 (Feb. 5, 1930) ("Commission on Communications").

resolutions starting in 1922 and continuing through 1927 in opposition to the depreciation provisions of the 1920 Esch-Cummings Act.[31] The 1929 NARUC annual convention passed a resolution opposing S. 6, and this resolution and resolutions of thirty-seven states were printed in the 1930 hearing record.[32]

As a result of State objections, some changes were made in the rate provisions of the 1929 bill,[33] but the language based on Section 20(5) of the Esch-Cummings Act remained unchanged.[34]

c. S. 2910 and H.R. 8301, as Introduced in 1934, Contained Language Suggested by NARUC to Change the Law.

Companion bills[35] were introduced by the chairmen of the respective Commerce committees in February, 1934, in response to President Roosevelt's message calling for creation of the Federal Communications Commission.[36] Section 220 of both bills

31. Benton twice cited in the hearing record the 1923 NARUC resolution. 1930 Senate Hearings at 2215; 1934 Senate Hearings at 184. These NARUC resolutions are printed in NARUC's annual proceedings, as follows: 1922 at 273; 1923 at 302; 1924 at 242; 1925 at 382, 386-87; 1926 at 250-51 (semble); and 1927 at 550-51.

32. Hearings on S. 6 before the Senate Committee on Interstate Commerce (71st Cong., 2d Sess.) at 2168, 2170, 2222-23, 2232-85 (1930)("Commission on Communications"); 1929 NARUC Proceedings 423.

33. These changes were designed to reverse the *Shreveport* doctrine enunciated by the Court in 1914, discussed under point I(C), *infra* at 24, 27-30.

34. *See* Section 69(b) of the confidential committee print of S. 6, dated April 23, 1930. This is presumably the committee print referred to in Benton's House testimony May 9, 1934. House Hearings at 140.

35. S. 2910 (73d Cong., 2d Sess.)(Dill-D [Wash.]) and H.R. 8301 (73d Cong., 2d Sess.)(Rayburn-D [Tex.]).

36. Message from the President of the United States Recommending that Congress Create a New Agency to be Known as the Federal Communications Commission, S.Doc. 144 (73d Cong., 2d Sess.)(February 26, 1934); 78 Cong.Rec. 3259. The Presidential message was in response to Senator Dill's letter to the President, dated February 24, 1934, requesting such a message and enclosing a copy of a committee print of the bill "prepared under the direction of Congressman Rayburn and myself", and to the "Study of Communications by an Interdepartmental Committee," a copy of which the President had sent to Senator Dill the preceding month "in the hope that it may be of assistance to you and your associates on the committee in your further study of the subject and in the construction of the needed legislation."

This activity followed upon the President's pocket-veto of H.R. 7716 (72d Cong., 2d Sess.), which would have amended only the Radio Act of 1927.

contained the preexisting Section 20(5) language, but both bills contained three new paragraphs (h-j) suggested by NARUC.[37] Subsections (h) and (i) were essentially as enacted into law in 1934. Subsection (j), which was ultimately not adopted, read as follows:

> (j) Nothing in this section shall (1) limit the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction with respect to any carrier, the percentage rate of depreciation to be charged to any class of property of such carrier, or the composite depreciation rate, for the purpose of determining charges, accounts, records, or practices; or (2) relieve any carrier from keeping any accounts, records, or memoranda which may be required to be kept by any State commission in pursuance of authority granted under State law.

The proposed addition of paragraphs (h-j) to Section 220 was explained in the House committee report as emanating from NARUC's desire to change the existing law:

> Section 220 (a-g) is taken from section 20 (5-8) of the Interstate Commerce Act dealing with accounts, records, and memoranda. It also adds the new provisions found in subsections (h), (i), and (j). *Subsections (h), (i), and (j) are responsive to the requests of the State commissions that the present law be changed so as to permit those bodies to exercise, for State purposes, certain jurisdiction over accounting systems and methods of depreciation accounting.*

37. *See* Colloquy between Senators Dill and Long during the Senate hearings on March 15, 1934, at 179; Testimony of NARUC's legislative committee chairman, Kit F. Clardy, *id.* at 154 ("The State commissions have worked out that language rather carefully...."); Testimony of NARUC Solicitor Benton, *id.* at 180 ("those provisions are in the bill because of representations which were made by State Commission representatives") and at the House hearings at 140 (May 9, 1934); March, 1934, Senate committee prints of S. 2910 at 36 and S. 3285 at 39 (Committee Print No. 5); Remarks of Chairman Rayburn, 78 Cong. Rec. 10314 (June 2, 1934).

House Report No. 1850 to accompany S. 3285 at 7 (June 1, 1934) (emphasis added). The testimony of NARUC's witness acknowledged that the House bill as drafted "removes provisions of the law which are now existent" that deprive the State regulatory bodies of authority over depreciation. Testimony of John E. Benton, House Hearings at 139 (1934).

d. Congress Finally Rejected NARUC's Proposed Changes in the Law.

The language of paragraph (j), which would have changed the existing law to permit the State commissions to exercise certain jurisdiction over accounting systems and methods of depreciation, drew fire at the hearings on the companion bills in both houses. It was largely rejected by the Senate Committee and ultimately by the Conference committee. The Conference committee also rejected two conforming amendments to Section 220(a) and (b), suggested in NARUC's testimony before the House committee and incorporated in the bill as passed by the House.

Paragraph (j) drew a withering attack from AT&T President Gifford.[38] Critical comments were offered by the chairman of the ICC's legislative committee, Commissioner McManamy, who advised the committees that the NARUC-sponsored language

38. Gifford testified at the Senate hearings on March 13, 1934, and again at the House hearings on May 10, 1934, that the situation created by the proposed addition of paragraphs (h) and (j) would be "astonishing," "anomalous," and "chaotic." Hearings before the Senate Commerce Committee on S. 2910 (73d Cong., 1st Sess.) 95-97 ("Federal Communications Commission"); Hearings before the House Commerce Committee on H.R. 8301 (73d Cong., 1st Sess.) 189-91 ("Federal Communications Commission").

Of the proposed changes in Section 220 of S. 2910, Gifford said:

> Comment upon this wholly anomalous situation seems to be unnecessary. This section makes an orderly advance and then beats a disorderly retreat. Paragraph (j) and the last part of paragraph (h) strike down practically all the sound and salutary provisions of the preceding paragraphs, and introduce chaos in place of the present orderly, sound, tried, and tested accounting. This would create an impossible situation even for a company operating in only one State. As applied to companies whose property and business cover two or more States, and even as many as nine States in the case of one of our companies, it is clearly out of the question.

1934 Senate Hearings, *supra*, at 96.

was inconsistent with the present law as reflected in the statutory provisions carried over from Section 20(5):

> Paragraph (j) of these new paragraphs should be most carefully considered. It unquestionably directly conflicts with, and destroys the uniformity of systems of accounts and depreciation accounting required by the preceding provisions of the section. That is not true under the present law.

Senate Hearings at 208; House Hearings at 96.

In the clean bill, S. 3285, as reported by the Senate committee and passed by the Senate, paragraph (j) was completely revised.[39] The Senate's amended version eliminated the proposed exemption for State regulation of depreciation, and proposed a direction to the FCC simply to study and

> to report to the Congress whether in its opinion legislation is desirable ... permitting the State commissions, in pursuance of authority granted under State law, to prescribe their own percentage rates of depreciation or systems of accounts, records, or memoranda to be kept by carriers.

S. 3285 as reported April 17, 1934, at 40 (Calendar No. 830). The Senate committee print of S. 3285 explained that this language was "in lieu of granting such authority to the States."[40]

At the following House hearings NARUC vigorously attacked the Senate change as "crippling State regulation".[41] The House

39. NARUC Solicitor Benton later ascribed the Senate's revision of paragraph (j) to a "response to a very vigorous attack made upon the accounting sections by President Gifford before the Senate committee." Hearings on H.R. 8301 before the House Commerce Committee (73d Cong., 2d Sess.) at 140 (April 10, 1934) ("Federal Communications Commission").

40. Senate Committee Print No. 5 at 39 (April, 1934). The Senate committee report to accompany S. 3285, S. Rpt. No. 781 (April 19, 1934), similarly notes at 2, 5 that under Section 220 the new commission is directed to investigate the "desirability of permitting state regulation of ... rates of depreciation charges.... instead of immediately turning over these matters to the State."

41. Testimony of Kit F. Clardy, Chairman of NARUC Legislative Committee, at Hearings on H.R. 8301 before the House Commerce Committee (73d Cong., 2d Sess.) at 70, 73 (April 11, 1934) ("Federal Communications Commission").

committee apparently accepted NARUC's urgings "that the present law be changed" to permit the State commissions "to exercise, for State purposes, certain jurisdiction over accounting systems and methods of depreciation accounting." H. Rpt. No. 1850 to accompany S. 3285 at 7 (June 1, 1934). The committee reported the bill with paragraphs (h-j) and certain conforming amendments to Section 220(a) and (b), as proposed by NARUC, and the House adopted the bill as reported, including the "*changes* [in Section 20 of the Interstate Commerce Act] necessary to permit State commissions to prescribe the systems of accounts for the intrastate operation of carriers." Remarks of Chairman Rayburn, 78 Cong. Rec. 10314 (June 2, 1934)(emphasis supplied).

The bills then went to conference. The Conference committee rejected the NARUC-sponsored language of the House bill and instead reported a Subsection (j) very closely tracking the "study and report" language of the Senate bill:

> (j) The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

The States' brazen attempt here to read the "investigate and report" language of Subsection (j) as *restricting* the FCC's power to prescribe accounts and depreciation to interstate services pending further legislation[42] --rather than reaffirming that power unless Congress later decided to restrict the power -- is refuted by other Conference committee action. The committee also rejected two other amendments to Section 220 that would have explicitly accomplished such a restriction on FCC authority. The House committee, at the urging of NARUC,[43] had amended the Esch-Cummings language in Subsections 220(a) and (b) to "avoid conflict" between those paragraphs and the paragraph (j)

42. California argues that Subsection (j), "as finally enacted ... expressly assumed dual regulation of depreciation and accounting matters." California brief at 21; *cf. id.* at 21-24, Louisiana brief at 37.

43. Testimony of NARUC's Benton before the House committee, May 9, 1934, House Hearings at 144.

language previously proposed by NARUC.[44] The Conference committee, concurrently with its rejection of the House version of Subsection (j), also rejected the House's proposed curtailment of FCC authority under Subsections 220(a) and (b).

The conference report was adopted by both houses; and the bill was signed by President Roosevelt on June 19, 1934. The conference bill, as signed into law, deliberately rejected the kind of language that Congress used when it wanted to permit States to make autonomous decisions about depreciation in *other* regulated industries.[45] Thus, the legislative history of Section 220 is as clear as any legislative history can be that Congress -- in carrying into the new act the language from Section 20(5) of the Esch-Cummings Act -- specifically considered, and consciously and unmistakably rejected, the States' attempt to prevent the FCC from succeeding to the ICC's plenary authority over accounting and depreciation.[46] As ICC Commissioner McManamy pointed

44. The House Committee, pursuant to NARUC's suggestion, amended Section 220(a) by deleting the words "any and all" before the word "accounts" ("The Commission may ... prescribe the forms of [any and all] accounts ... to be kept by carriers subject to this Act ...") and amended Section 220(b) by adding the phrase, "in the accounts prescribed by the commission," so that it read, in part, "After the Commission has prescribed the classes of property for which depreciation charges may be included, no carrier shall, *in the accounts prescribed by the Commission*, charge to operating expenses any depreciation charges on classes of property other that those prescribed by the Commission...."

45. In the Federal Power Act, passed in 1935, and in the Natural Gas Act, passed in 1938, language similar to NARUC's paragraph (j) was included, in conjunction with other language somewhat similar to the provisions of Section 220(b) of the 1934 Act. In those enactments Congress added a provision expressly preserving any State jurisdiction over depreciation:

> Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed ... for the purpose of determining rates or charges.

15 U.S.C. § 717h(a); virtually identical language appears in 16 U.S.C. § 825a(a). Congress used similarly explicit language in Section 213(h) of the Communications Act pertaining to valuations of carrier property, as it also did in Section 221(b).

46. The transition provisions in Section 604 of the 1934 Act, now 47 U.S.C. § 704 (1985), providing that the ICC's determinations of carriers' depreciation charges should continue in effect under the new act, further suggest that the 1934 Congress perceived no inconsistency between the existing authority of the ICC over depreciation and that conferred on the new FCC.

out, the pre-existing scheme provided for a Federal regulatory agency to impose coherent systems of accounts and depreciation; Congress rationally opted to continue the unified approach rather than to create a crazy-quilt of bifurcated depreciation systems. The FCC's order here does no more than implement that Congressional decision.

C. Section 2(b) Does Not Limit the Preemptive Force of FCC Prescriptions Under Section 220(b).

The States' argument that the intrastate exemptions in Section 2(b) limit the FCC's power under Section 220(b) to prescribe depreciation for carrier property is incorrect, both as a matter of textual analysis and as a matter of historical fact.[47]

1. *Section 2(b) Does Not Bar Federal Regulation of "Dual Jurisdiction" Property.*

Section 2(b) cannot sensibly be read as foreclosing what Sections 1 and 2(a) expressly establish as the primary goals of the Act: comprehensive and effective Federal regulation of interstate carriers and property used in interstate (as well as intrastate) communications.

Section 2(b)(1) has as its limited purpose the reversal of the *Shreveport* doctrine.[48] The exception at most reserves State authority over purely intrastate rates and purely intrastate facilities. This case, however, involves *carriers* over whom the FCC has explicit jurisdiction, because they are involved in interstate communications, and it involves facilities jointly used in *interstate* (as

47. In pertinent part, Section 2(b) of the 1934 Act exempting intrastate service and connecting carriers from Federal jurisdiction provides:

> [N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2)any carrier engaged in interstate or foreign communication solely through physical connection with the facilities....

47 U.S.C. § 152(b) (App. I at I-3-5.)

48. Section 2(b)(1) was intended to reverse the Court's holding in *Shreveport, supra*, that the intrastate proviso in Section 1 of the Interstate Commerce Act did not prevent the ICC from directly ordering intrastate rates raised to eliminate discrimination against interstate commerce. *See* point I(C)(2), *infra*.

well as intrastate) communication, rather than solely in intrastate communication. Thus, this narrow intrastate exception to the Congressional plan giving the FCC comprehensive jurisdiction over the interstate telephone network does not diminish the FCC's ultimate power over facilities used in interstate communication.

The States' argument that property used even in part in intrastate communications is immunized from Federal regulation simply proves too much, and it has been rejected by the FCC and by every Federal court that has considered it. *See North Carolina Util. Com'n* v. *FCC*, 552 F.2d 1036, 1045-49 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977)(North Carolina II); *CCIA* v. *FCC*, 224 U.S.App.D.C. 83, 99-103, 693 F.2d 198, 214-18 (1982), *cert. denied*, 461 U.S. 938 (1983); *New York Tel. Co.* v. *FCC*, 631 F.2d 1059, 1064-66 (2d Cir. 1980); *Puerto Rico Tel. Co.* v. *FCC*, 553 F.2d 694, 699-700 (1st Cir. 1977).[49]

The States argue that the FCC's prescription of depreciation for dual jurisdiction property would impinge on the exclusive power to set intrastate rates, reserved to them under Section 2(b)(1) of the Act. Their argument overlooks the fact that their "reserved" jurisdiction under Section 2(b)(1) as to dual-jurisdiction property goes no further than Congress chose to allow it in pursuing the overriding national goal of effectively promoting and regulating an integrated interstate telephone system. Congress' decision to give the FCC the power to prescribe depreciation rates and methods for dual jurisdiction property no more impinged on the claimed prerogatives of the States than did Congress' analogous grant to the FCC in Section 221(c) of final authority to classify such mixed use property by jurisdiction, even though those Federal determinations have a profound inpact on local rates. Similarly the FCC's ultimate power to impose depreciation policies complements the FCC authority pursuant to Section 214(a) and (d) to authorize or require construction of facilities

49. *See also* Virginia State Corp. Com'n. v. FCC, 737 F.2d at 392-96 (A-8-17), rejecting the contention below; NARUC v. FCC, 237 U.S.App.D.C. 390, 408-10, 737 F.2d 1095, 1113-15 (1984), *cert. denied*, 105 S.Ct. 1224 (1985).

without concurrent State approval.[50] In each case Congress provided for State participation in the decision- making process, but assured Federal supremacy, if a conflict might undermine the statutory goals. *See* Sections 214(b), 220(i), 221(c), and 410(b).

2. ***The Section 2(b) Exemptions Do Not Override the FCC's Authority Under Section 220(b) to Prescribe Depreciation Rates and Methods.***

The Section 2(b)(1) exemption for "intrastate communication service" does not override the requirement for Federally prescribed uniform accounts and depreciation systems under Section 220(b). It is plain both textually and structurally that Section 2(b) was not intended to limit the FCC's authority to prescribe such systems.

Section 2(b)(1) is but a paraphrase of the language of Section 1 of the Interstate Commerce Act. As a result of the 1920 amendments, Section 1(2) of the Interstate Commerce Act read in pertinent part:

> (2) The provisions of this Act shall ... not apply -- ... to the transmission of intelligence by wire or wireless wholly within one State....

41 Stat. 474.[51] This is substantively indistinguishable from Section 2(b)(1) of the 1934 Act.[52]

As has been previously noted, however, and as is demonstrated in Appendix III, *infra*, Section 220(a) and (b) were copied almost word-for-word from Section 20(5) of the Esch-Cummings amendments of 1920. Predecessor language in Section 1 of the Esch-Cummings Act of 1920 was never considered to limit

50. Section 214(c) specifically provides that after issuance of a certificate of public convenience and necessity by the FCC the carrier may proceed with the construction, etc., authorized therein "without securing approval other than such certificate".

51. This language was essentially a reenactment of the language of Section 1 of the Mann-Elkins Act of 1910, 36 Stat. 539, 545, which brought communications carriers under the Interstate Commerce Act. The 1920 reenactment of the language is significant because contemporaneous with the enactment of Section 20(5) and hence *in pari materia*.

52. "[N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service ... of any carrier...." 48 Stat. 1064, 47 U.S.C. §152(b)(1)(App. I at I-5).

the preemptive effect of the ICC's prescriptions.[53] Just as that language did not limit the plenary authority of the ICC with respect to depreciation under the predecessor language of Section 220(b), so Section 2(b)(1) does not limit the FCC's plenary authority under Section 220(b).[54]

The limited purpose behind Congress' confining of the 1934 exemption to carriers' "intrastate communication service" is borne out by its legislative history. Section 2(b)(1) was inserted into the Couzens bill in the Spring of 1930[55] at the request of NARUC.[56] NARUC's purpose, readily acceded to by all the government parties to the legislative process, was to prevent application of the *Shreveport Doctrine* to communications. The precise holding of this Court in *Shreveport*[57] was that the intrastate proviso in Section 1 of the Commerce Act[58] did not prevent the ICC from directly ordering intrastate *rates*, tariffed with the State commissions, raised to eliminate discrimination against interstate commerce.[59]

To meet these vehement objections by NARUC to the application of the *Shreveport Doctrine* to intrastate telephone rates -- which, unlike the railroads' tariffs, covered some ninety percent of

53. *See* Point I(B)(2)(a), *supra* at 15-17.

54. Of the predecessor language of Section 2(b)(1), NARUC's General Solicitor Benton wrote: "[T]he saving language ... can not be expected to be more effective in this act ... than the same language has heretofore proved to be in the act creating the Interstate Commerce Commission." 1930 Hearings at 2226-27.

55. Committee print of S. 6 (71st Cong., 1st Sess.), §65(d), at 76 (April 23, 1930).

56. Testimony of NARUC's General Solicitor Benton before the House Committee, May 9, 1934. Hearings at 136; *cf. id.* at 139-40.

57. Houston, E. & W. Tex. Ry. v. U.S., *supra*.

58. "*Provided, however*, that the provisions of this Act shall not apply to the transportation ... wholly within one State...." 36 Stat. 544 (1910).

59. This holding was embodied in the Interstate Commerce Act by Section 416 of the Esch-Cummings Act, which added to Section 13 of the 1887 Act two new paragraphs, specifying procedures to be followed when the ICC encountered discriminatory intrastate rates and providing that the corrective tariff prescribed by the ICC should override "the law of any State or the decision or order of any State authority to the contrary notwithstanding." 41 Stat. 484. These provisions were carried over into Section 35(c) and (d) of the Couzens bill of 1929, S. 6 (71st Cong., 1st Sess.).

the traffic[60] --the Senate committee added the following provision to Section 65 of S. 6:

> (d) Nothing in this Act shall be construed to authorize the commission to regulate rates, charges, or services for or in connection with any intrastate communication by wire or radio whether for the purpose of removing discrimination against interstate commerce or for any other purpose.

Confidential committee print of S. 6 (71st Cong., 1st Sess.) at 76 (April 23, 1930). The "whether" clause showed a primary intent to reach the holding of the *Shreveport* rate case, while also closing off any other rationale for direct Federal regulation of rates for intrastate services.

Though the language was subsequently revised and moved to Section 2(b) of the 1934 bills and, ultimately, of the Act, nothing in the NARUC testimony before the Senate and House committees and the reports and debates with respect thereto evinces any intent to reach specific situations beyond direct Federal ratesetting such as in *Shreveport*.[61]

That the State commissions' concern should have been centered on the ultimate rates to be charged for "intrastate communication service" is understandable,[62] since the State commissions' regulation of telephone companies largely focussed on rates.[63]

60. Testimony of F. B. MacKinnon, President of USITA, before Senate Committee on Interstate Commerce, February 3, 1930. 1930 Senate hearings at 2124-25, 2127-29, 2134.

61. The evolution of Section 2(b) is detailed in Appendix II, *infra*.

62. Under questioning from Congressmen Monaghan (D-Mont.), Pettengill (D-Ind.), and Merritt (R-Conn.) in 1934, NARUC's witness admitted that the State commissions had encountered difficulty in effectively regulating the telephone companies. House Hearings at 141. The same witness had previously testified to difficulties of the same kind with respect to depreciation specifically. 1930 Senate Hearings at 2217. *See also* testimony of Paul Walker, then chairman of the Oklahoma Corporation Commission and later author of the FCC's "Walker Report," characterizing the State commissions as "practically helpless" in the face of the vast "telephone problem." House Hearings at 69. *Cf.* Wheat, "The Regulation of Interstate Telephone Rates," 51 Harv.L.Rev. 846, 847 (1938) ("The complex nature of the telephone business ... has frequently rendered state regulatory efforts ineffective, and in certain respects wholly nugatory.").

63. Although State statutes providing for certificates of public convenience and necessity began to supersede legislative charters as the

The States further argue that this Congressional assignment of authority over dual jurisdiction property should be flouted, because it is supposedly inconsistent with the State's responsibility for setting rates for intrastate services recognized in Section 2(b)(1). The FCC's power to prescribe depreciation, however, is not the same as the power, invoked by the ICC in *Shreveport*, to prescribe the actual intrastate rates themselves. Contrary to the States' assertions, the FCC did not preempt the ratemaking process at the State level.

What the States ignore is that not everything impacting rates is ratemaking. *See Western Un. Tel. Co.* v. *FCC*, 214 U.S.App.D.C. 308, 333, 665 F.2d 1126, 1151 (1981). As the FCC explained below, "The setting of depreciation rates and classes of depreciable property only resolves a single issue impacting the ratemaking process." *1983 Preemption Order*, 92 F.C.C.2d at 874 (A-41). The other elements of the ratemaking process remain undisturbed in the State regulatory process. Depreciation charges, when Federally prescribed, are no different from other externally determined expenses that are not under the control of the State regulators, such as labor costs or Federal taxes, that must be recognized in the State ratemaking process. As the ICC noted early on,[64] "depreciation is a fact" to be taken into regulatory account.

The FCC was careful to limit its preemption within the scope of both established case law and the terms of its governing Federal statute. Executing the explicit direction of Congress expressed in Section 220(b) of the Act and finding it necessary to achieve the statutory goal of an efficient nationwide telecommunications service, the Commission preempted only one element of telephone plant regulation: depreciation of plant used jointly for interstate

instruments of State regulation of rail routes in the years preceding the First World War, the intervention of the War, Federal operation of the railroads, and the general financial weakness of the railroads rendered more-or-less moot the question of State commission power to issue route certificates. *See* Jones: "Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920," 79 Colum.L.Rev. 426, 455 (1979). In many States during this era the territory of telephone companies was delimited by municipal franchises rather than by State certificates.

64. Telephone and Railroad Depreciation Charges, 118 I.C.C. 295, 325-326 (1926).

and intrastate communications. Hence the *Shreveport* reservation of the 1934 Act is not relevant here.

The States' argument[65] that the "charges" exempted by Section 2(b)(1) encompasses "charges for depreciation" involves merely a clever word game. It is clear that "charges" in Section 2, as elsewhere in Sections 1, 201-05, etc., refers only to *rates* paid by the telephone subscribers. In Section 2(b), therefore, the term means only that, contrary to *Shreveport*, the FCC should not have authority to prescribe the rates tariffed for intrastate telephone service.

Even if, standing alone, Section 2(b) might appear to have a broader implication, Congress dealt specifically with the issue of Federal-State authority over carriers' depreciation. Depreciation has always been considered a special and separate matter in regulated industries. Section 220(b) specifically and independently gives the FCC the power to prescribe depreciation rates and methods and to make those prescriptions conclusive for all regulatory purposes. To read Section 2(b) as exempting State commissions from Federal depreciation requirements would render redundant the more carefully considered and circumscribed exemptions of Section 220 and would offend the canon of statutory construction that the more specific language controls the more general.[66]

Moreover, to construe the exemptions of both Section 2(b) and 220 as reading on accounts and depreciation would produce redundant (but inconsistent) treatment of the same subjects.[67]

65. California brief at 14-16.

66. In the *Special Permission* case, AT&T v. FCC, 487 F.2d 865, 877 n. 26, (1973), the Second Circuit applied to construction of the 1934 Act "the maxim that general language of a statute usually does not apply to a matter specifically dealt with in another part of the same statute," *citing* Ginsburg & Sons v. Popkin, 285 U.S. 204, 208 (1932). *Cf.* Fourco Glass Co. v. Transmirra Prod. Corp. 353 U.S. 222, 228-29 (1957); Bulova Watch Co. v. U.S., 365 U.S. 753, 758 (1961) ("familiar law"); Fidelity Fed. S.& L. Ass'n. v. de la Cuesta, 458 U.S. 141, 163 (1982).

67. The redundancy is avoided when the Court recalls that NARUC's legislative proposal in 1934 treated the proposed exemption from Federal control over depreciation separately from Section 2(b)'s reservation of residual power over rates for local services. NARUC's proposed clause to save States' rights in Section 220(j) of S. 2910 and H.R. 8301 was expressly limited to "Nothing in this section...", again suggesting that Section 220 was intended to be a self-contained treatment of accounting and depreciation.

Such a redundant reading would be particularly illogical, since both Section 2(b) and Section 220(h)-(j) had a common origin in the NARUC-sponsored provisions in the companion bills introduced in February, 1934.[68] If the language of Section 2(b)(1) had been viewed as sufficient to foreclose Federal preemption of depreciation, NARUC would not have found it necessary to press so vigorously -- but unsuccessfully -- to include in Section 220 its proposed paragraph (j)(1), exempting State prescriptions.[69]

The States cannot responsibly invoke Section 2(b) now to derive the authority that Congress specifically decided not to give them when it addressed and, ultimately, rejected, their proposed amendment to Section 220 itself.

II.

THE FCC PROPERLY DECLARED ITS PRESCRIPTION PREEMPTIVE.

The FCC's decision below to preempt inconsistent State depreciation orders was an agency option plainly contemplated by Congress in 1934, and the Commission fully justified its decision to preempt inconsistent State depreciation systems.

68. Any suggestion that Section 221(b) adds to Section 2(b)(1)'s intrastate exemption, *see* Louisiana brief at 33, should similarly be rejected on the ground of redundancy. Every court that has considered the argument has rejected it, recognizing that the Section 221(b) exemption applies only in the specific case of local exchange service crossing state lines, such as in the Kansas City and Washington, D.C., metropolitan areas. *See* CCIA v. FCC, 224 U.S.App.D.C. 83, 101-02, 693 F.2d 198, 216-17 (1982), *cert. denied*, 461 U.S. 938 (1983); North Carolina Util. Com'n. v. FCC, 537 F.2d 787, 795 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976); Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 698-99 (1st Cir. 1977); New York Tel. Co. v. FCC, 631 F.2d 1059, 1064-65 (2d Cir. 1980); *cf.* S. Rept. No. 781 (73d Cong., 2d Sess.) 5 (1934); H. Rept. No. 1850 (73d Cong., 2d Sess.) 7 (1934); Remarks of Congressman Rayburn, 78 Cong. Rec. 10314 (June 2, 1934); Remarks of Sen. Dill, 78 Cong. Rec. 8823 (May 15, 1934); *see also id.* at 8846-47; Testimony of NARUC's General Solicitor Benton, House hearings at 137, *citing* Pennsylvania Gas Co. v. New York PSC, 252 U.S. 23, 30-31 (1920) (interstate pipeline providing local service held subject to State regulation in the absence of Federal regulation).

69. Similarly, Sections 213(h) and 221(d) would have been unnecessary if Section 2(b)(1) had been intended to limit FCC valuations of carrier property.

A. The Commission Followed Congressional Intent in Preempting State Orders.

Congress clearly contemplated that in appropriate circumstances the FCC, no less than the ICC, should preempt inconsistent State depreciation orders in the interest of uniformity. *Cf. Capital Cities Cable* v. *Crisp*, 104 S.Ct. 2694, 2700 (1984). As demonstrated in Point I(B)(2)(a) above, the Section 20(5) language, which was carried over into Section 220(b) of the '34 Act, authorized the agency to issue preemptive orders. Indeed, the ICC construed the language as requiring it to do so, save for telephone companies so small it was impractical.[70] Knowing of this preemptive construction, Congress reenacted the Section 20(5) language as part of the Communications Act. On this basis alone the Court should sustain the two commissions' interpretation of their own statutes as giving Federal prescriptions of depreciation rates and methods preemptive effect.

In addition, Congress made specific provision in the 1934 Act in contemplation of preemption. Congress would have had no reason to include in Section 220(i) a provision requiring mandatory consultation with the States on accounting and depreciation matters if it had not contemplated that FCC orders would affect State regulatory decisions. Nor would there have been any conflict to "harmonize" through future legislation, as contemplated by Section 220(j), if Congress had not recognized that the FCC's depreciation prescriptions would impinge upon the State ratemaking process. Thus, Section 220 unmistakably contemplates that the FCC could impose its determinations if consultations did not achieve consensus.

On the record here the FCC had an adequate basis to conclude that it should not, under Section 220(h), waive the presumptively preemptive effect of its depreciation prescriptions. It also had an adequate basis to conclude that, apart from any preemptive effect flowing directly from Section 220(b), achievement of its statutory purposes reasonably required it to preempt inconsistent State systems of depreciation.[71] *See Capital Cities Cable* v. *Crisp*, *supra*, at 2703; *Fidelity Fed. S. & L. Ass'n.* v. *de la Cuesta*, *supra*, at 153-54, 169-70.

70. Telephone and Railroad Depreciation Charges, 118 I.C.C. 295, 333 (1926), quoted in note 26, *supra*.

71. 737 F.2d at 394, 396 (A-12-17).

B. The FCC's Decision Not to Use Its Preemptive Power Over Depreciation in Prior Matters Did Not Forfeit Its Power to Do So Here.

Past practices of the FCC and the State commissions do not require a construction of the statute making Federal depreciation orders non-preemptive. Agency practice after 1920 involving a cooperative division of responsibilities between the ICC and the States was in accord with the best traditions of Federal-State cooperation.[72] The holdings of *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133, 159-60 (1930), and *Northwestern Bell Tel. Co.* v. *Nebraska State Ry. Com'n.*, 297 U.S. 471, 478 (1936), that State determinations with respect to telephone company accounts should govern until displaced by subsequent, inconsistent Federal determinations, fully validated that agency practice. *Cf. Arkansas Elec. Coop.* v. *Arkansas PSC*, 461 U.S. 375, 388-89 (1983).

The past practice is consistent with the language of (i) Sections 20(5) and 220(b), which contemplates that the Federal commission might not instantaneously prescribe depreciation; (ii) Section 220(h), which contemplates that the FCC might elect to leave particular classes of carriers subject to prior-existing State regulation; and (iii) Section 410(b), which authorizes the Federal commission "in the administration of this Act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission."[73] The FCC's practice of holding "three-way meetings" on depreciation with the State and the affected carrier is wholly consistent with Section 220(i), which authorizes the Commission to "consult" with the States but does not require it to accede to non-uniform accounting systems.

72. In its 1926 depreciation order the ICC expressed confidence in its ability to deal with deficiencies in the carriers' accounts brought to its attention through "the helpful cooperation which we anticipated from those [State] commissions in the administration of telephone depreciation accounting." Telephone and Railroad Depreciation Charges, 118 I.C.C. 295, 347.

73. The language of Section 410(b) was derived from Section 13(3) of the Interstate Commerce Act, which had been relied on by the ICC in its depreciation proceeding under the 1920 Act. *See* Telephone and Railroad Depreciation Charges, 118 I.C.C. 295, 333 (1926).

Many of the cases cited here by the States for the proposition that the States have historically prescribed telephone company accounts on their own authority are readily explicable by reference to the provision of the FCC's Uniform System of Accounts that expressly *allows* the States to require sub-accounts for state regulatory purposes.[74] Moreover, actions and pronouncements of the State commissions are not persuasive constructions of the Federal statute under the contemporaneous agency construction doctrine. In any event, this Court has twice approved mandatory accounting prescriptions by the FCC. *See AT&T* v. *U.S.*, 299 U.S. 232 (1936); *U.S.* v. *New York Tel. Co.*, 326 U.S. 638 (1946).

The FCC's willingness to defer the preemptive force of its prescriptions until it became apparent that non-conformity by the States was becoming a significant problem was an appropriate exercise of Federal-State comity. When the FCC did preemptively prescribe depreciation rates and methods, it adequately explained why it had determined no longer to allow carriers and State commissions to depart from a uniform depreciation system.[75]

74. Section 220(g) permits the FCC *to authorize* departures from its Uniform System of Accounts. *See* Accounting Rules for Telephone Companies, 203 I.C.C. 13, 16 (1934); Uniform System of Accounts, 47 C.F.R. §§ 31.01-1(f), 31.01-2(d) and (f), and 33.12(d). In its *1983 Preemption Order*, however, the FCC pointed out the practical limitation to the States' account subdivision argument:

> A subdivision rule, however, does not permit what is accounted for as an expense to be capitalized in the guise of subdividing an expense account. While we may allow subdivisions of accounts, we will not allow inconsistent accounting or depreciation methods unless such practices are otherwise consistent with the public interest.

Op. cit., 92 F.C.C.2d at 873-74 (A-40). *Cf.* Accounting Rules for Telephone Companies, *supra*, at 16-17.

75. In the *1983 Preemption Order* the Commission explained the changed circumstances bearing on depreciation rates and methods in these terms:

> In the past the communications marketplace was typified by monopoly conditions and life and salvage factors underlying the state rates were generally very similar, if not identical, to those used by the Commission. In that environment it was not essential that the Commission assert all the authority granted it. *See Computer and Communications Industry Association* v. *FCC* [224 U.S.App.D.C. 83, 693 F.2d 198 (1982), *cert. denied*, 461 U.S. 938 (1983)]. As discussed, *infra*, in the more competitive

C. Preemption Was Necessary to Avoid Frustration of Federal Depreciation Policies.

The FCC reasonably concluded that preemption of inconsistent State depreciation orders was necessary to avoid frustration of Federal depreciation policies. The agency's expert judgment on that point is entitled to judicial deference.

The determination by the Commission in its *1983 Depreciation Order* no longer to allow carriers to depart from uniform Federal depreciation rates and methods was a reasonable one in light of current conditions in the telephone industry. The introduction of competition into a heretofore monopolistic environment by the FCC and the Bell divestiture by the courts, among other developments, had rendered inadequate previous rates and methods of depreciation. Discrepancies between Federal and State depreciation rates and methods had become large, as (i) the useful lives of telephone plant became shorter due to technological and economic obsolescence and (ii) the accumulating reserve deficiencies of the carriers (due to under-depreciation) became economically intolerable.[76]

As a practical matter, preemption was necessary to avoid the mathematical impossibility of reconciling inconsistent State and Federal rates and methods of depreciation for the same property. This mathematical impossibility was meticulously demonstrated to the FCC in the petition of GTC of Ohio (J.A. 89, 92-97, 119-21).

The nature of depreciation in rate-regulated industries makes it inherently undesirable to apply inconsistent rates and methods to

> conditions prevailing today, the utilization of proper methods and rates is more critical if the proper incentives are to be created to insure that the marketplace will function efficiently to bring the benefits of the competition to the ratepayers of this country.

Op. cit., 92 F.C.C.2d at 874 (A-40-41).

76. *See 1983 Preemption Order*, 92 F.C.C.2d at 874, 876-78 (A-40-41, 44-47). A recent study by an agency of the Department of Commerce has pointed to an aggregate reserve deficiency of as much as $25 billion. *See* National Telecommunications and Information Administration: Issues in Domestic Telecommunications: Directions for National Policy 142 (NTIA Spc.Pub. 85-16) (DOC 1985).

the same items of telephone plant and other equipment in calculating Federal and State rates.[77] In its *1983 Depreciation Order* the FCC reasonably determined that proper depreciation could not be achieved with inconsistent rates and methods applicable to the same property -- the ratepayer would either be charged too much or too little over the life of the property, and consequently the carrier would recover either more than its investment or less than its investment. *Op. cit.*, 92 F.C.C.2d at 878 (A-47).

The States would have the Court believe[78] that the total investment in a single piece of plant can be divided jurisdictionally on the books of the telephone company and that differing rates and methods of depreciation can be successfully applied to the two fractions. This is arguably true only in the most theoretical sense, but the FCC was surely authorized to take a more practical and realistic approach. In the absence of uniform treatment, discrepancies between actual investment and aggregate recovery of that investment through differing annual depreciation charges would inevitably result. *Id.* at 878 (A-47). Thus, the utility would either recover less than or more than 100 percent of its investment. Congress clearly intended that this not happen.

In point of fact, application of differing rates of depreciation -- which implies differing lives -- to the two jurisdictional portions of the same piece of equipment will inevitably result in frustrating the whole purpose of depreciation, which is to match depreciation charges of the equipment with the revenues generated by its use. In real terms this means either that the equipment is retired before the investment has been recovered through depreciation on the longer-lived portion, or that the equipment remains in service while no depreciation is being accrued on the shorter-lived portion. Either case offends the principles and underlying concepts of depreciation, for which Congress provided.

77. It should be "obvious," NARUC told the ICC shortly after the Esch-Cummings Act was passed in 1920, that, "where the same property is used for interstate and intrastate service, two different sets of rates for depreciation do not prevail." *See* Remarks of Commissioner Hopple, Chairman of the Ohio PUC, in NARUC Proceedings 460, 465 (1936).

78. *See* Louisiana brief at 40-41; *cf.* California brief at 4-5 n. 6.

As another practical complication, the FCC was entitled to take into account that, under the Separations Manual, the jurisdictional apportionment of investment is recomputed periodically.[79] Thus, not only would differing rates of depreciation be charged as to each jurisdictional fraction of the equipment during its physical life, but the sum of the two depreciation charges would fluctuate year-by-year over the joint in-service life of the two portions. Again, the end result would inevitably be under-depreciation or over-depreciation. *Id.* at 878 (A-47).

These discordant consequences have several effects that the FCC was entitled to avoid. First, discrepancies in depreciation for the same property misallocate the costs of service between interstate and intrastate ratepayers. Second, inaccurate or unrealistic schedules for depreciation frustrate the goal of having the ratepayer actually benefitting from the equipment pay his proper share of its cost. Third, artificially delaying full recapture of capital investment discourages or prevents investment in new technology. Since the same plant is used for both interstate and intrastate communications, a State commission's willingness -- under local pressure from some ratepayers or otherwise -- to retard new investment necessarily creates a drag on the interstate network itself. In practical terms, therefore, State depreciation policies are not severable from their impact on the integrated interstate communications system.

With considerable prescience, Congress in 1934 plainly contemplated a comprehensive depreciation system for the telephone industry. In Section 220 Congress explicitly assigned to the FCC the responsibility for telephone company depreciation, with all the powers necessary to discharge that responsibility. Presented here, therefore, is not a question of merely ancillary power but the exercise of a charter explicitly issued by Congress to the FCC. The FCC's judgment, pursuant to that charter, that preemption now is required was solidly founded on the practical necessities of achieving a workable depreciation system in an era of rapid technological and economic obsolescence. *Cf. Florida L. & A. Growers* v. *Paul*, 373 U.S. 132, 142 (1963).

79. *E.g.*, FCC Rules, 47 C.F.R. § 67.611 (1984). *See 1983 Preemption Order*, 92 F.C.C.2d at 878 (A-47).

Only after a long and careful study of the depreciation problem in Docket No. 20188[80] did the FCC conclude that the changed telecommunications environment required the adoption of new depreciation policies to allow full and timely recovery of capital. That is the sort of agency judgment that is entitled to the fullest judicial deference. Since Congress manifested in Section 1 of the 1934 Act its intent to centralize in the FCC the authority needed to achieve what are critical *national* goals, the Court should defer to the agency's judgment that allowing inconsistent State depreciation orders would undermine important Federal policies for achieving those goals.

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80. Property Depreciation, 83 F.C.C.2d 267 (1980) (J.A. 4), *recon. denied*, 87 F.C.C.2d 916 (1981) (J.A. 45). Docket No. 20188 involved an exhaustive study of depreciation over a seven-year period. It included thousands of pages of submissions by industry and State commissions, among others; a special study by Ernst & Ernst, Inc., commissioned by the FCC; and a review of the entire subject of depreciation by Commission staff reflected in a "Primer" made part of the record. Further, the Commission, sitting *en banc*, heard presentations by Commission staff as well as industry spokesmen stressing the critical importance of depreciation in the new environment of telecommunications. Similarly, in Docket No. 79-105 below, extensive Commission resources were dedicated, over a period of several years, to reviewing the issues in light of more thousands of pages of submissions, again including submissions by State commissions. With active participation by Commissioners, this led first to the Commission's expensing and amortization program for station connections, Amendment of Part 31, 85 F.C.C.2d 818 (1981), and then to the *1983 Preemption Order*. It would be difficult to conceive of an agency's conducting a more thorough examination of a subject.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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